

DEFENDING DISCRIMINATION: ON THE CONSTITUTIONALITY OF INDEPENDENT SCHOOLS THAT PROMOTE A PARTICULAR, IF NOT COMPREHENSIVE, VISION OF THE GOOD LIFE

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1 Introduction

This article attempts to answer the following two linked, but distinct, questions. First, to what extent does our current legal regime tolerate independent schools that advance particular, if not comprehensive, visions of the good life? Secondly, to what extent may such independent schools discriminate between learners in terms of admissions policies or expulsion procedures in order to further their legitimate, constitutional-sanctioned religious, cultural or linguistic ways of being in the world?

These questions are particularly piquant because, when it comes to public schools, the State's tolerance for discriminatory religious, cultural and linguistic admissions policies or expulsion procedures is extremely limited and rightly inclines in favour of learners from historically disadvantaged communities. As I have argued elsewhere,¹ the Constitution of the Republic of South Africa, 1996 (Constitution) does not guarantee a right to single medium public schools, faith-based public schools or culturally homogenous public schools.

Still, for those learners and their parents who want to know whether they are entitled to create and to maintain a school that furthers a particular linguistic, cultural or religious way of being in the world, the Constitution contains a much more sanguine response. Under section 29(3), learners and their parents may, using their own resources, build an independent school that offers their preferred medium of instruction, that reinforces a specific cultural ethos, or that promotes a comprehensive religious vision of the good life.

¹ See Woolman *Community Rights: Language, Culture and Religion* in Woolman, Roux, Klaaren, Stein, Chaskalson & Bishop (eds) *Constitutional Law of South Africa* 2 ed Original Service (March 2007) ch 58; Fleisch & Woolman "On the Constitutionality of Single-Medium Public Schools" 2007 23 *SAJHR* (forthcoming).

2 Community rights

According to the received version of modern South African constitutional history, justiciable community rights were anathema to both the African National Congress (ANC) and the National Party (NP). The NP believed that white minority interests would be better protected at the level of distribution of governmental power, rather than by judicial mechanisms. The NP proposed only non-discrimination guarantees and individual rights to speak a language or to participate in “cultural life”.² The most the ANC would concede were rights to form “cultural bodies”, to religious freedom, and, perhaps, to require that the State act positively to further the development of South Africa’s eleven official languages.³ The ANC insisted that minority rights *qua* static, non-demographically representative levels of political representation were unacceptable. The Bill of Rights, as it currently stands, constitutes the ANC’s compromise between unfettered majority rule on the one hand, and structural guarantees for privileged, but now “vulnerable”, political minorities, on the other.

The ANC’s concession was not insignificant. The Constitution’s rejection of group political rights⁴ was at least partially compensated by the “notable levels of constitutional significance” to which cultural, linguistic and religious matters were elevated.⁵ The Constitution contains six different provisions concerned with culture, eight with language and four with religion.⁶ The Constitution, as a liberal political document, thereby carves out significant “private” space within which self-supporting cultural, linguistic and religious formations might flourish.

Indeed, the Constitutional Court has recognised the sanctity of that space. In *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995*,⁷ Krieger J wrote that section 32(c) of the

² See Government of the Republic of South Africa *Proposals on a Charter of Fundamental Rights* (2 February 1993) arts 6 and 34.

³ African National Congress *A Bill of Rights for a New South Africa: Preliminary Revised Version* (1992) art 5(3)-(7).

⁴ See Sachs *Opening Remarks* at Konrad Adenauer *Stiftung* Multiculturalism Seminar (1999) available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/Sachs.pdf>, (accessed 1 April 2006) 1: “The instruments . . . of government are not based on cultural groups, cultural communities or representation in terms of membership of a particular community.”

⁵ See Venter *The Protection of Cultural, Linguistic and Religious Rights* at Konrad Adenauer *Stiftung* Multiculturalism Seminar, available at <http://www.kas.org.za/Publications/SeminarReports/Multiculturalism/VENTER.pdf>, (accessed 1 April 2006) 19.

⁶ See Venter *The Protection of Cultural, Linguistic and Religious Rights* 19. Provisions of the Constitution dealing with culture, language and religion include, but are not limited to: (a) ss 9, 30, 31, 235 (culture); (b) ss 6, 29, 30, 31, 35, 235 (language); and (c) ss 9, 15, 30, 31 (religion). These various provisions were driven, at least in part, by three constitutional principles enshrined in the interim Constitution. Adherence to these principles – as part of the negotiated settlement – was price of peace. Two of the principles required recognition of minority rights and another required the inclusion in the Constitution of a provision ensuring a right of self-determination by any community sharing a common cultural and language heritage.

⁷ 1996 3 SA 165 (CC) pars 39-42.

interim Constitution,⁸ section 29(3) of the final Constitution⁹ and then extant national and provincial education legislation and subordinate legislation collectively constitute

“a bulwark against the swamping of any minority’s common culture, language or religion. For as long as a minority actually guards its common heritage, for so long will it be its inalienable right to establish educational institutions for the preservation of its culture, language or religion . . . There are, however, two important qualifications. Firstly, . . . there must be no discrimination on the ground of race . . . A common culture, language or religion having racism as an essential element has no constitutional claim to the establishment of separate educational institutions. The Constitution protects diversity, not racial discrimination. Secondly, . . . [the Constitution] . . . keeps the door open for those for whom the State’s educational institutions are considered inadequate as far as common culture, language or religion is concerned. They are at liberty harmoniously to preserve the heritage of their fathers for their children. But there is a price, namely that such a population group will have to dig into its own pocket.”

More recently, in *Minister of Home Affairs v Fourie (Doctors For Life International & Others Amici Curiae)*; *Lesbian & Gay Equality Project v Minister of Home Affairs*,¹⁰ the Constitutional Court found that the State could not continue to enforce common-law rules and statutory provisions that prevented same-sex life partners from entering civilly-sanctioned marriages and that denied same-sex life partners the status, the responsibilities and the duties enjoyed by opposite-sex life partners. State sponsored discrimination would not be tolerated. The Court did not make the same demands of religious dominations or religious officials. It held that the Constitution had nothing to say about religious prohibitions on gay and lesbian marriage and could not be read to require religious officials to consecrate a marriage between members of a same-sex life partnership. So long as religious communities do not distribute public goods – or are not the sole distributors of such goods – the State, according to the Court, cannot justifiably coerce a religious community into altering its basic beliefs and practices:

“In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step in and counteract rather than reinforce unfair discrimination against a minority. The test, whether majoritarian or minoritarian positions are involved, must always be whether the measure under scrutiny promotes or retards the achievement of human dignity, equality and freedom. The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.”¹¹

⁸ Constitution of the Republic of South Africa, Act 200 of 1993.

⁹ Constitution of the Republic of South Africa, 1996.

¹⁰ 2006 1 SA 524 (CC) pars 90-98. See also *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) pars 36-37 (no religious denomination would be compelled to marry gay or lesbian couples).

¹¹ Par 96.

Indeed, the *Fourie* decision makes it patently clear that to the extent that exclusionary practices are designed to further the legitimate constitutional ends of religious, cultural and linguistic associations, and do not have as their aim the denial of access to essential primary goods, then our Constitution's express recognition of religious, cultural and linguistic pluralism commits us to a range of practices that the Constitutional Court will deem fair discrimination. The refusal of some religious officials to consecrate same-sex life partnerships as marriages under religious law is but one form of *fair* discrimination. As I have argued at length elsewhere,¹² no form of meaningful human association – marriages, nuclear families, extended families, friendships, burial societies, trade unions, neighbours, neighbourhood security watches, political parties, bowling clubs, political action groups, stokvels, corporations, non-governmental organisations, professional regulatory bodies, charities, guilds, churches, synagogues, mosques, temples, schools, parent-teacher committees, school governing bodies, co-op boards, landless people's movements, internet forums, foundations, trusts – is possible without some form of discrimination. The *hard* question is whether such discrimination rises to the level of an unjustifiable impairment of the dignity of some of our fellow South Africans.¹³ Again, this question turns on access to the kind of goods that enable us to lead lives that allow us to flourish. It is easy to find that golf clubs that have been the bastion of white male Christian privilege must open their doors to persons of all colours, all sexes and all religions. But what of stokvels that provide access to capital to members of a community – but not to outsiders? What of religious secondary schools that do discriminate on the basis of religion and, at the same time, offer a better general education than that generally on offer in our public schools? One would be foolish to dismantle such institutions solely on the grounds that either some form of exclusion takes place or that some re-inscription of privilege occurs. Human beings work, and make meaning in the world, through social networks of various kinds. Taking a sledgehammer to social institutions that create and maintain large stores of real and figurative capital is a recipe for a terribly impoverished State. The *hard* question challenges us to determine the extent to which religious, cultural and linguistic communities can engage in justifiable forms of discrimination in the furtherance of constitutionally legitimate ends and the extent to which the State and other social actors can make equally legitimate claims on the kinds of goods made available in these communal formations that cannot be easily accessed elsewhere.

¹² See Woolman *Freedom of Association* in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed OS (December 2003) ch 44; Woolman *Dignity* in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed OS (December 2005) ch 36.

¹³ See Pienaar "The Effect of Equality and Human Dignity on the Right to Religious Freedom" 2003 66 *THRHR* 579.

This brief foray into the constitutional history of community rights – and especially the rights of religious, cultural and linguistic communities – captures the general terrain upon which independent schools based upon a particular or comprehensive vision of the good life currently operate. This history suggests that community-based institutions that do not receive State support can rely upon exclusionary practices to further their constitutionally legitimate objectives so long as they do not offend, unjustifiably, the basic law's commitment to the protection of the dignity and the equality of all South Africans.

3 State attempts to control independent schools

Over the past several years, the ANC government, emboldened by ten years of democracy and majority rule, has started to flex its muscle. Concerns about consolidating power through reconciliation have receded. The State is now in a better position to consolidate its power through policy initiatives closer to its heart and to challenge existing patterns of privilege. The open textured character of the law in this area (of admissions policy, language policy and equity requirements) creates the necessary terrain for political contestation.

As I have already argued elsewhere with respect to school fees, school choice and single medium public schools, the lacuna in the law must, at some level, be viewed as intentional.¹⁴ Whether the issue was school choice, school fees, the medium of instruction, teacher-hiring, or language policies, the fragile post-apartheid State of the mid-1990's crafted legislation and regulation that divided management, governance and policy-making responsibilities between national government, provincial government, provincial Heads of Department, teachers, principals, unions, SGBs, parents and learners, without establishing clear hierarchies of authority. The result was that private actors in the mid-1990s were able to assert their interests through legal channels without having to worry about being rebuffed by the State. The price the State paid for such assertions of private power was small by comparison to the compensatory legitimization that it secured through *de jure* and *de facto* decentralisation.

By the *fin de siècle*, however, the State's concerns had shifted from anxiety about its quiescence to apprehension about the speed of transformation. A good example of this shift is on display in the State's efforts to bring independent schools to heel by attempting to control their age of admittance. This contrivance benefited from the fact that age – unlike religion, culture or language – appears to be a neutral identifier. The State believed that it could go after independent schools in this

¹⁴ See Fleisch & Woolman "On the Constitutionality of School Fees: A Reply to Roithmayr" 2004 22 (1) *Perspectives in Education* 111; Woolman & Fleisch "South Africa's Education Legislation, Quasi-Markets and School Choice" 2006 24 (2) *Perspectives in Education* 1; Fleisch & Woolman "On the Constitutionality of Single-Medium Public Schools" 2007 23 *SAJHR* (forthcoming).

manner without having to worry about alienating a particular constituency – a constituency that would mobilise around other ascriptive identifiers such as language, religion or culture. What the State failed to take sufficiently seriously was the ability of individual parents to mobilise around the interests of their own children.

In *Harris v Minister of Education*,¹⁵ the High Court found that the State's age restrictions on admission to Grade 1 constituted an unjustifiable impairment of Talya Harris' right to equality. While the Court did not doubt that the State had the authority to pass such regulations with regard to independent schools, it found that the State had failed to tender any adequate justification for its policy.¹⁶ The *Harris* case stands for two propositions. It reinforces this article's basic contention that the Constitution creates significant space within which independent schools may flourish. It also underwrites the argument that the State will have to meet a fairly high evidentiary threshold should it wish to alter the admissions policies of independent schools.

4 Legal framework for admissions policies at independent schools

As I noted at the outset, one purpose of this article is to assess the extent to which the laws governing admissions policies (and expulsion procedures) at independent schools permit such schools to discriminate in the pursuit of legitimate constitutional and statutory objectives: namely the furtherance of particular religious, cultural and linguistic ways of

¹⁵ 2001 8 BCLR 796 (T). The King David School refused to admit Talya to Grade 1 in 2001 – even though her parents believed she was ready. The refusal to admit Talya was based upon a notice issued by the Minister of Education stating that independent schools could only admit learners to Grade 1 at the age of seven. Unwilling to take the risk that Talya might experience a developmental deficit after being held back a year, Talya's parents decided to challenge the constitutionality of the notice so that their daughter could be admitted to Grade 1 in 2001.

¹⁶ The Minister was naturally afforded an opportunity to rebut the presumption of unfair discrimination. First, the Minister argued that six-year old children were more likely to fail than seven-year old children and such failure rates had serious financial consequences for the State. Secondly, the Minister argued that the diversity of cultures and languages within South Africa produced insuperable difficulties for the creation of a school readiness test. Thirdly, the Minister argued that there are sound pedagogical reasons for starting formal education at age 7.

The Court rejected all three arguments tendered by the Minister because the State had failed to adduce any evidence. As a result, the State also failed to rebut the presumption that unfair discrimination on the grounds of age had taken place. More importantly, the result thwarted State efforts, on apparently neutral grounds, to control private power as exercised through private institutions. The age requirements themselves were not especially important to the State. What was important to the State was to control the manner in which privileged parents and schools created educational opportunities for their children. The *Harris* case supports the proposition that the State may not assert control over independent schools simply because they are privileged. The associational rights or communitarian rights of the parents who send their children to independent schools trump State interests in equality where the equality interest asserted cannot be backed up by any compelling pedagogical reason.

The Constitutional Court added insult to injury in *Minister of Education v Harris* 2001 4 SA 1297 (CC). It decided the matter without reaching the substance of the equality challenge. The Constitutional Court (pars 11-13) found that the Minister lacked the requisite authority under NEPA s 3(4) to create a rule that obliged independent schools to admit learners to Grade 1 only after they turned seven. NEPA s 3(4) empowered the Minister to create non-binding policy, but not law, with respect to the provinces and the independent schools found therein.

being in the world. This section's exercise in constitutional and statutory interpretation attempts to set out the correct legal framework for understanding the limits of exclusionary admissions policies designed to promote particular or comprehensive visions of the good life in independent schools. With respect to the admissions policies of independent schools, this section pays particular attention to the circumstances in which associational interests, or community rights, trump considerations of equality. In short, those exclusionary admissions policies in independent schools that can be closely tied to the furtherance of constitutional legitimate objectives – say an academic curriculum that makes religious instruction mandatory in order to instill a deeper sense of faith within the broader religious community or a syllabus that makes language instruction in a particular tongue obligatory in order to sustain its use within a given cultural community – will likely pass constitutional muster.

4 1 The Constitution

The language of section 29(3) reflects both the initial fragility of the post-apartheid State and the basic law's commitment to carving out "private" space for the establishment of institutions designed to further the legitimate constitutional objectives of religious, cultural and linguistic communities:

"Everyone has the right to establish and maintain, at their own expense, independent educational institutions that (a) do not discriminate on the basis of race; (b) are registered with the State; and (c) maintain standards that are not inferior to standards at comparable public educational institutions."¹⁷

The language of section 29(3) suggests that independent schools possess substantially more latitude than public schools with respect to their admissions requirements (and their expulsion procedures).

4 2 Statutory framework and statutory interpretation

4 2 1 *SASA and PEPUDA*

Statutory interpretation may appear to be a rather dry, academic exercise. But in historical circumstances such as ours, the stakes can be quite high. A State that is cognizant of the canons of statutory interpretation can use them to great advantage without actually announcing to the general public what advantage it seeks. In the case of admissions policies in independent schools, I want to suggest that a South African State growing in confidence, and moving from a reconciliatory politics to a politics of redress, has been able to use accepted canons of statutory interpretation to narrow the space within

¹⁷ Interim Constitution s 32(c) read, in pertinent part: "(e)very person shall have the right. . .to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race".

which privileged communities can continue to exclude persons from historically disadvantaged communities from independent, and often exclusive, educational institutions.

The statutory language around admissions policies at independent schools is quite permissive. Section 46(3)(b) of the South African Schools Act¹⁸ (SASA), engages independent school admissions policies as follows:

“[A provincial] Head of Department *must* register an independent school if he or she is satisfied that . . . the admission policy of the school does not discriminate on the grounds of race.”¹⁹

To understand just how permissive the constitutional, statutory and regulatory framework for admissions at independent schools “appears” to be, one need only look at how admissions policies at public schools are treated in SASA. The SASA test for unfair discrimination with respect to admissions requirements at public schools tracks the test for unfair discrimination found in section 9 of the Constitution.²⁰ Indeed, it would appear to encompass just about any imaginable ground for unfair discrimination. According to section 5(1) of SASA:

“A public school must admit learners and serve their educational requirements without unfairly discriminating in any way.”

Section 5(2) and 5(3) of SASA also bars the use of tests, fees, mission statements or a refusal to sign a waiver for damages as grounds for refusing admission to any learner.²¹

¹⁸ 84 of 1996.

¹⁹ While no mention of admissions policies is made in these regulations, the enabling provision for these regulations in SASA, s 46(3)(b), states that a provincial “Head of Department *must* register an independent school if he or she is satisfied that . . . the admission policy of the school does not discriminate on the grounds of race”. The language of the Gauteng School Education Act 6 of 1995 (GSEA) and the regulations issued pursuant to the Act, appear equally permissive. See GSEA ch 8 *Discrimination at Private Schools* s 68: “Admissions requirements for private schools shall not directly or indirectly discriminate unfairly on grounds of race.” Regulations passed by Gauteng under SASA, entitled “Notice Regarding the Registration and Withdrawal of Registration of Independent Schools”, do *not* make the registration – and the continued accreditation – of independent schools contingent upon the conformation of admissions policies with specific equity requirements.

²⁰ PEPUDA analysis largely tracks s 9 of the Constitution. According to the Constitution s 9(4), “no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)”. Private persons and juristic persons are clearly bound by s 9. S 9(3) establishes the prohibited grounds for discrimination: “The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” S 9(5) reverses the burden where discrimination on a prohibited ground occurs: “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.” See, eg, *Harksen v Lane* 1998 1 SA 300 (CC) par 53.

²¹ According to GSEA ch 3 “Admission to Public Schools” s 11: “Admission requirements for public schools shall not unfairly discriminate on grounds of race, ethnic or social origin, colour, gender, sex, disability, sexual orientation, religion, conscience, belief, culture or language.” Regulations passed under GSEA, entitled “Admission of Learners to Public Schools”, subject admissions requirements at public schools to even stricter scrutiny than the enabling legislation. See regulations passed under GSEA s 11(1) and the Gauteng Education Policy Act 12 of 1998 (GEPA) s 4(a)(i), entitled “Admission of Learners to Public Schools”, General Notice 4138 of 2001 (PG 129 of 13 July 2001). The regulations expand – in line with s 9 of the Constitution – the grounds for a finding of unfair discrimination with respect to admissions policies. Express grounds now embrace ethnic or social origin, pregnancy, HIV/AIDS status, or any other illness. Indeed, the regulations – in line with s 9 and SASA – leave the list of grounds open-ended so as to encompass “unfair discrimination against a learner in any way”. They likewise bar the use of admissions tests or fees to exclude a learner. The regulations’ one open window for disparate treatment enables a gender specific school to refuse admission on the grounds of gender.

These statutory provisions suggest that a significant gap exists between the equity requirements for admissions at independent schools and public schools. Permitting such a significant disjunction to occur between the law governing public institutions and the law governing private institutions might appear consistent with the imperatives of both a fragile and a liberal State.²² Indeed, were one to read – today – only those constitutional and statutory provisions that engage educational institutions directly, the change in the legal landscape, of which I shall now speak, might pass unnoticed.

The enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act²³ (PEPUDA) – in 2000 – demonstrates both the increased power of the State and its willingness to use the law to challenge privilege and to further redress. To start off, PEPUDA applies to private parties.²⁴ An independent school, as a juristic person, is thus bound by PEPUDA.

More importantly, the tests for unfair discrimination set out in PEPUDA and SASA that engage expressly admissions policies at independent schools, are not identical. The tests set out in the sectoral legislation governing admissions policies at independent schools limit the grounds for a finding of unfair discrimination to race. The tests set out in PEPUDA are demonstrably broader in scope. Resort must be had to standard canons of statutory interpretation in order to determine which law applies to admissions policies at independent schools.²⁵

Accepted canons of statutory interpretation tell us to look first to the language of the apposite pieces of legislation when attempting to determine which law has primacy of place.²⁶ PEPUDA makes it clear

²² That we have good reasons for treating “public” social formations differently from “private” social formations is a matter that lies beyond the scope of this article. I defend a strong commitment to associational freedom elsewhere. See Woolman *Freedom of Association* in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed OS (December 2003) ch 44.

²³ 4 of 2000.

²⁴ See PEPUDA s 5(1): “the State and all persons are bound by the Act”. See also PEPUDA s 6: “Neither the State nor any person may unfairly discriminate against any person.”

²⁵ The supremacy clause of the Constitution requires that all law be consistent with its provisions. However, where no inconsistency exists, and where provisions of a statute or subordinate legislation or a rule of common law afford an applicant an adequate remedy and enable a Court to decide the case before it, it is now trite law that the Courts ought not to analyse the matter in terms of the provisions of the Constitution. See *S v Mhlungu* 1995 3 SA 867 (CC) par 59 (“[W]here it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”) See also *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) par 8. For the purposes of this article, I assume that the apposite provisions of PEPUDA and SASA – and all subordinate legislation – are consistent with any and all provisions of the Constitution. That does not mean that provisions of PEPUDA or SASA cannot be found to be constitutionally infirm. It only means that an analysis of their susceptibility to a constitutional challenge is not germane to this article. A Court is also apt to take into account the fact that PEPUDA is the piece of super-ordinate legislation contemplated by s 9(4) of the Constitution “to prevent or prohibit unfair discrimination”. At a minimum, a Court will attempt to read down the provisions of PEPUDA in order to save them from a finding of invalidity. See, eg, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC).

²⁶ See, generally, Du Plessis *The Re-interpretation of Statutes* 5 ed (2002); Botha *Statutory Interpretation* 4 ed (2005).

that its provisions prevail over all other law – save where an Act expressly amends PEPUDA or the Employment Equity Act²⁷ applies. Section 5 of PEPUDA reads, in relevant part:

“Application of Act: . . . (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail. (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.”

A second canon of statutory interpretation tells us that more recent legislation ought to prevail. PEPUDA postdates SASA. Finally, although canons of statutory interpretation state that, *ceteris paribus*, more specific sectoral legislation or subordinate legislation ought to trump more general legislation, SASA does not contain any language that would suggest that in the event of a conflict between those pieces of legislation and another piece of legislation, SASA ought to prevail.²⁸ PEPUDA, both as a piece of ordinary legislation, and as a piece of super-ordinate legislation that gives effect to the equality provision of the Constitution,²⁹ would appear to prevail over all other pieces of legislation that engage equality considerations in independent schools.

This result might come as a bit of a surprise to those persons *au fait* with the regulation of school admissions by sector specific education legislation. Certainly, nothing in the express wording of PEPUDA would tell a reader that this legislation displaces SASA. No amendments have been made to various pieces of education specific legislation that would suggest a sea-change in the State’s approach to the admissions policies of independent schools. And yet the law is clear. The State has quietly shifted the goal-posts.

4 2 2 PEPUDA and admissions policies at independent schools

Neither the application provisions of PEPUDA nor the date of its passage tell us how the provisions of that statute – or at least the test for unfair discrimination – ought to be applied to admissions policies in independent schools.³⁰ How then should PEPUDA be construed in this context?

Although neither SASA nor apposite provincial legislation dictates how the general terms of PEPUDA ought to be applied to the sectoral

²⁷ 55 of 1998.

²⁸ SASA s 2 reads, in relevant part: “(1) This Act applies to school education in the Republic of South Africa. . . .(3) Nothing in this Act prevents a provincial legislature from enacting legislation for school education in a province in accordance with the Constitution and this Act.”

²⁹ S 9(4).

³⁰ The only mention of education in PEPUDA occurs in the “Illustrative List of Unfair Practices in Certain Sectors” that appears as a Schedule to the Act. S 2 of the Schedule reads, in relevant part: “Education – (a) Unfairly excluding learners from educational institutions, including learners with special needs. (b) Unfairly withholding scholarships, bursaries, or any other form of assistance from learners of particular groups identified by the prohibited grounds.” The list does not purport to distinguish between public, State-aided independent schools and non-State-aided independent schools.

specific context of admissions policies in independent schools, a Court will, generally, take into account the distinctions made in such sectoral specific education legislation.³¹

Of course, it is also possible that both the national government and various provincial governments believe that the admissions policies of public schools and independent schools ought to be treated differently. The content of that differential treatment is that, in the furtherance of legitimate constitutional objectives, an independent school may adopt admissions policies that have a discriminatory effect so long as there is no intent to discriminate on the basis of race. The rationale for this differential treatment is found in the Constitution itself. Independent schools may be set up in order to further a particular religious or cultural vision of the good life so long as the policies of the independent school “do not discriminate on the basis of race”. What explains the permissive attitude of our basic law with respect to the admissions, membership and expulsion practices of private religious or cultural or linguistic associations? As Van Dijkhorst J wrote in *Wittmann v Deutsche Schulverein, Pretoria*,³² the right to create and to maintain these independent schools must, to be meaningful, embrace “the right . . . to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity”.

How then should we read the provisions of PEPUDA – and the apposite provisions of SASA, the Constitution, as well as our extant body of common law – when attempting to determine when, or even whether, independent schools may exclude learners? The following account delineates the appropriate form of legal analysis for educators, schools and Courts faced with such a question.

4 2 3 PEPUDA's test for admissions policies at independent schools

According to PEPUDA, no person – public or private – may discriminate in a manner that imposes, directly or indirectly, burdens upon and withholds, directly or indirectly, benefits from any person on prohibited grounds.³³ A *prima facie* demonstration of discrimination on a

³¹ As we have already seen, the national government and the Gauteng provincial government subject the admissions policies at public schools and independent schools to fundamentally different tests for unfair discrimination. The prohibited grounds for unfair discrimination in GSEA and in the regulations for admissions in public schools passed under GSEA and GEPA track closely the prohibited grounds found in PEPUDA. The prohibited grounds for unfair discrimination in GSEA and SASA for independent schools are limited to race. In addition, the Gauteng provincial government has not seen fit to pass regulations governing admissions policies at independent schools. At least one implication of these distinctions is inescapable. If the Gauteng provincial government is aware of the shift in the legal landscape wrought by PEPUDA, then it has decided not to announce its awareness of that shift.

³² 1998 4 SA 423 (T) 454.

³³ See PEPUDA s 1. “Discrimination” means “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”. “Prohibited grounds” are “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, *religion*, conscience, belief, culture, language and birth” (emphasis added).

prohibited ground shifts the burden to the respondent to show that the discriminatory law, rule or conduct is fair.³⁴

An Equality Court hearing a PEPUDA challenge to admissions policies at an independent school will likely find a school's rejection of a learner, because she refused to take religion, language or culture classes, to constitute "discrimination". That initial finding does not, of course, mean that the Equality Court is obliged to find that the practice constitutes unfair discrimination. PEPUDA anticipates expressly the requisite grounds for justification of discrimination. Section 14(3) of PEPUDA states that fair discrimination may occur where the respondent can demonstrate that: "(f) . . . the discrimination has a legitimate purpose; [and] (g) . . . the . . . discrimination achieves its purpose".

An independent school will first have to show that the set of religious, linguistic or cultural practices that form the basis for its restrictive admissions policies offer a coherent account of the religion, language or culture ostensibly being advanced. Most independent schools that have the furtherance of religion, culture or language as an end should be able to meet this test for "legitimate purpose".

The next leg of the test is somewhat more onerous. Once a legitimate purpose is established, the question becomes whether the discriminatory admissions policy is necessary to achieve the school's purpose of offering an education grounded in a particular faith, language or culture. One argument – consistent with my discussion of voice, entrance and exit below – is that an independent school committed to the furtherance of a particular religion, language or culture needs to be able to control its message and that such control requires it to have relatively unfettered control over admissions practices. How strict can such exclusionary admissions policies be?

At a minimum, any learner must agree to adhere to the curriculum of the school – at least in so far as it requires specific forms of religious, linguistic or cultural instruction. After all, if the purpose of the school is to further a given religion, language or culture, then the curriculum must be designed to advance that religion, language or culture. If the curriculum is essential for the achievement of the school's legitimate purpose, then the exclusionary rule based upon a learner's refusal to follow the curriculum must be viewed as a measure that – while discriminatory – is narrowly tailored to meet the legitimate purpose.

Can a school adopt exclusionary criteria (and expulsion procedures) that go beyond adherence to the school's curriculum? That depends. The

³⁴ See PEPUDA s 13: "if the discrimination did take place on a ground in paragraph (a) of the definition of 'prohibited grounds', then it is unfair, unless the respondent proves that the discrimination is fair".

school would be obliged to show that something more than the education itself is necessary to sustain a religion, a language or a culture. The fluidity of language and the permeability of culture suggest that pre-existing membership in the linguistic or cultural community ought not to be, as a general matter, a basis for exclusion.³⁵ Anyone can speak Afrikaans; anyone, over time, can become a South African.

But what of smaller cultural groups and linguistic communities? Could a colourable claim be made that because the Khoi community in South

³⁵ One cannot speak of religious, linguistic and cultural communities as if they all took the same form and were therefore subject to identical treatment under the Constitution. At a gut level, one would like to be able to say that there is, however, a sliding scale of judicial solicitude for these communities: a scale that runs from fairly weak in so far as linguistic communities are concerned, to medium strength with respect to cultural communities, to very strong with regard to religious communities. This intuition is driven primarily by the varying degrees of permeability of linguistic communities, cultural communities and religious communities. Anyone can learn to speak a language and thereby join a community of fellow conversants. Religious communities, on the other hand, can make admission almost impossible. Cultural communities possess an “I know it, when I see it” character, and thus make any talk about ease of entrance (and potential membership) rather elusive: is it easier to become American or French? Is it easier to become Zulu or Sotho? The text of the Constitution and the decisions handed down by our Courts tend to confirm this admittedly limp set of intuitions. See *Fourie (supra)* pars 90-98. (In the *Fourie* case, the Constitutional Court goes out of its way to note that no religious order and no religious official will – as a result of the Court’s finding that the State must treat the marriage of same-sex life partners in the same manner as it treats opposite-sex life partners – be required to consecrate same-sex life partnerships as marriages under religious law. The Constitutional Court has, however, shown demonstrably less hesitancy in altering customary law arrangements enforced by traditional leaders, common law and statute. See, eg, *Bhe v Magistrate, Khayelitsha* 2005 1 SA 580 (CC), 2005 1 BCLR 1 (CC) (Court declared the customary law rule of male primogeniture invalid.)

There are two primary difficulties with trying to squeeze any further analytical precision out of the terms “religious community”, “linguistic community” and “cultural community” as they appear in the Constitution. The first difficulty flows from the lack of consensus as to how terms like “cultural community”, “religious community” or “linguistic community” are to be used. The second related difficulty stems from the fact that many of the specific social formations or entities that fall within the protective ambit of ss 30 and 31 of the Constitution can often be described in all three terms – religion, language and culture. This descriptive over-determination could complicate our analysis of the constitutional claim being made. Is an independent Jewish day school promoting a religion, a culture, a people, a nation, or just the Hebrew language? Is an independent German day school promoting a culture, a people, a nation, a language, or a religion?

With respect to the first difficulty, Gutmann *Identity in Democracy* (2003) 38 notes: “When the term culture is loosely used, cultural identity subsumes the entire universe of identity groups, and every social marker around which people identify with one another is called cultural. Culture, so considered, is the universal glue that unites people into identity groups, and the category becomes so broad as to be rather useless for understanding differences.” See also Young *Justice and the Politics of Difference* (1990) 22-23 152-155.

Other theorists take a tougher line. For Raz & Margalit *National Self-determination in Raz (ed) Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) 119, the only legitimate candidates for treatment as cultural communities are those communities which provide an “all-encompassing” or a “comprehensive” way of being in the world. See also Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (2002); Shachar *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (2001); Macedo (ed) *Deliberative Politics: Essays on Democracy and Disagreement* (1999); Gutmann & Thompson *Democracy and Disagreement* (1996); Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995). In addition, Raz & Margalit *National Self-determination* 118 write that such communities provide both an “anchor for self-determination and the safety of effortless, secure belonging”. Belonging, in turn, is a function of membership: “Although accomplishments play their role in people’s sense of their own identity, it would seem that at the most fundamental level our sense of our own identity depends upon criteria of belonging rather than on those of accomplishment. Secure identification at that level is particularly important to one’s well-being.” (117). What Raz & Margalit fail to make fully explicit is the connection between a community that provides a comprehensive way of being in the world and a community that provides a secure sense of belonging. A community that provides a comprehensive way of being in the world generally provides a host of rules that govern most aspects of daily life. The benefits of belonging – of membership – flow to those who follow the rules. Follow the rules and one belongs. Flout the

Africa is small and has such limited resources, an independent school must be able to direct its limited funds to the education of children of Khoi descent? In the abstract, that claim seems plausible enough. Moreover, the argument from equity might support measures designed to advance a previously disadvantaged group – even if such measures come at the expense of another previously disadvantaged group. This argument secures somewhat greater support in the context of schools designed to advance religion. It seems credible, if perhaps disturbing to non-adherents, to suggest that a religious education requires a religious environment. But the effective promotion of a faith may require that a learner be in an environment where others take their faith seriously and do not merely put up with curriculum requirements because of other educational advantages afforded by the institution. Whether this claim about the need for a homogeneous religious environment supports a

rules and one can find oneself on the outside of the community looking in. (Comprehensiveness then is a feature of communities with very strict codes of behaviour and harsh penalties – shunning or ex-communication – for rule non-compliance.) Although Raz & Margalit’s definition of “cultural community” – properly understood – certainly provides greater traction than looser definitions, it would seem to exclude too many social formations that we would intuitively describe as cultural communities. Amish Americans constitute a community that fits the rule-following, comprehensive vision of the good life model that Raz & Margalit’s definition is meant to capture. The strict dictates of the Amish’s version of Christianity married to a pastoral existence that eschews almost all forms of modern technology sets the Amish apart. Moreover, continued membership in the community is contingent upon adherence to religious dictates and other non-religious norms. Such communities would, if they could, withdraw entirely from the largely secular polity within which their community exists. As it stands, they simply draw invisible lines between us and them. But the Amish community in America does not fit commonplace understandings of cultural communities.

I would, at one point in my life, have certainly identified myself as part of the Jewish community of the greater New York metropolitan area. But there were no rules to follow – and I followed none. So while I certainly felt a sense of belonging, no penalties could be exacted for rule non-compliance and my “membership” could never be threatened. Thus, Raz & Margalit’s definition of “cultural community” confirms our first difficulty: locating precise definitions for the entities protected by ss 15, 29, 30 and 31.

But they also tell us something important about our second difficulty – that of descriptive over-determination. (And by descriptive over-determination I simply mean the ability to describe the same community in terms of two or more of the following characteristics: religion, culture and/or language). It would seem to me that descriptive over-determination – though a fact about many communities – is not a constitutional problem. What matters, for the purposes of constitutional analysis, are membership and rule-following. For an extended analysis of the relationship between membership and rule-following, see Woolman *Freedom of Association* in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed OS (December 2003) § 44.1(c). Issues of membership and rule-following come up much more frequently in religious communities than in cultural communities or linguistic communities because many religious communities offer quite comprehensive visions of the good life. While most religions are defined by reams of ecclesiastical doctrine, languages are defined by their grammar and their syntax. People are rarely excused from communities for bad grammar (though they may be shunned in Paris). And so, my intuitions about a sliding scale of judicial solicitude are borne out by the comprehensiveness of the religious tenets and practices of religious communities, and the necessary, but hardly comprehensive role that language plays in linguistic communities. What then are we to do in cases of descriptive over-determination where religion, language and culture all serve to define a particular community and the institutions upon which members have built the community? Since community appropriate rule-following behaviour determines continued membership within the community, then the conflict that confronts the Court will often be about whether a person’s behaviour (or State action) conforms to the community’s accepted canons of rules. The community practice at issue – religious, linguistic, cultural – will reveal itself in the very terms of the dispute. That is, the dispute will reveal itself to be about religion, language or culture.

strict policy of exclusion – or only the more lenient curriculum-based policy – is a very close question.

What is interesting about this “close” question is that the State – through PEPUDA – is able to force a private actor to look to the Constitution to support its position. Given that the Constitution is always the last port of call, and that its generally stated precepts admit to any number of different constructions, the State, through PEPUDA, will have succeeded in putting independent schools on their back foot.

But being on one’s back foot is not the same as being underfoot. In crafting their justifications for exclusionary admissions policies and expulsion procedures, independent schools can rely upon various general provisions in the Constitution, sections 15, 18, 29, 30 and 31, that protect religious belief, practice, tradition, association and community, as well as the express right in section 29(3) to create independent educational institutions. Independent schools can therefore argue that they exist in order to advance the basic law’s general commitment to the protection of a variety of religious, cultural or linguistic ways of life. Moreover, as Van Dijkhorst J noted in the *Deutsche Schulverein* case,³⁶ the right to education guarantees that members of a religious, linguistic or cultural community may “establish their own [private] educational institutions based on their own values”. It was held that the right to create these independent schools is parasitic upon “the right . . . to exclude non-users of that language and non-adherents of that culture or religion, or to require from them conformity”.³⁷ In sum, the constitutional right to run an independent school grounded in culture, language or religion inevitably entails a concomitant right to exclude students who do not wish to adhere to curriculum requirements grounded in a given language, culture or religion. The only thing an independent school may not do – under PEPUDA or SASA – is exclude a learner on the grounds of race.³⁸

The last point I want to make in this section is that while the State – through PEPUDA – has narrowed the space within which independent educational institutions can exercise their discretion over admissions policies, our State remains a constitutional democracy that must work within a framework of basic rights and freedoms. That means that an ever more powerful State cannot assume that “redress” legitimates each and every policy initiative it undertakes. So while the burden of justification for the discriminatory admissions policies may fall on independent schools, the factors in section 14(3) of PEPUDA place genuine responsibility on the complainant (and the State) to demonstrate

³⁶ 1998 4 SA 423 (T) 454.

³⁷ 454.

³⁸ The apposite language of SASA mirrors that of s 29(3) of the Constitution. SASA s 46(3)(b) reads: “the admission policy of the school may not discriminate on the grounds of race”.

that the exclusionary admissions policies or expulsion procedures in question do, in fact, deleteriously affect the complainant.³⁹

4 3 Constitutional constraints on PEPUDA in the context of independent school admissions policies

4 3 1 Rule-following as a condition of membership

Recent constitutional case law supports the contention that independent religious associations and independent culture-specific schools have the right to expel members who agree to follow the rules or decisions of the association's governing body and subsequently refuse to do so. In *Taylor v Kurtstag*,⁴⁰ the Witwatersrand High Court upheld the right of the Beth Din to issue a *cherem* – an excommunication edict – against a member of the Jewish community who had agreed to follow its ruling with regard to an order for child maintenance. In *Wittmann v Deutsche Schulverein, Pretoria*,⁴¹ the Pretoria High Court upheld the right of a school governing body to expel a student who knew that she was obliged to attend language and religious instruction classes and who subsequently refused to attend these classes. Both cases underwrite the proposition that in order for a religious association or cultural association to remain committed to the practice of certain beliefs, it must control the voice of, the entrance to and the exit from the association. Thus, to the extent that a learner has agreed to abide by school curriculum policy in order to secure entrance to an independent school, such an independent school would be well within its constitutional rights to expel that pupil for failure to adhere to those requirements.

³⁹ PEPUDA s 14(3)(b) states that the trier of fact must take into account “the impact or likely impact of the discrimination on the complainant”. Assume that an independent Jewish secondary school in Johannesburg requires all matriculants to consent to a curriculum that includes Hebrew and Talmudic study. One can safely assume that that most, if not all, non-Jewish students will experience the most minimal impairment of their dignity if they are turned away from the school based upon their refusal to accept the curriculum. The reason the impairment is minimal is that a non-Jewish student (or even a Jewish student) who does not wish to follow such a curriculum has a significant amount of choice with respect to school matriculation in an urban area such as Johannesburg. Moreover, any child in a position to afford private school fees has an even greater array of options. The contention that the educational opportunities of a non-Jewish student with such resources will be significantly diminished by being denied admission to an independent Jewish school in an urban or a peri-urban area lacks purchase.

⁴⁰ 2004 4 All SA 317 (W) par 38. (Constitution s 18 – freedom of association – “guarantees an individual the right to choose his or her associates and a group of individuals the right to choose their associates”. The right of a group to choose their associates of necessity means the right to require those who wish to join the group to conform their behaviour to certain dictates, and the right to exclude those who refuse to conform.)

⁴¹ 1998 4 SA 423 (T) 451: “Does this mean that private parochial schools which do not receive State aid may not prescribe obligatory attendance at their morning prayers and confessional religious instruction classes? The answer is negative. Section 17 of the interim Constitution and s 18 of the Constitution recognise the freedom of association. Section 14(1) and s 15(1) respectively recognise the freedom of religion which includes the right to join others in worship, propagation of the faith etc. Freedom of association entails the right with others to exclude non-conformists. It also includes the right to require those who join the association to conform with its principles and rules.”

4 3 2 *Expulsion, rule-following and fair hearings*

An independent school's right to expel a student who fails to adhere to the rules is subject to two provisos. The first proviso is that the independent primary and secondary school must make clear what curriculum requirements are to be followed by the learner prior to her admission. The second proviso is that a learner (or family) facing expulsion must receive a fair hearing from the independent school in question.⁴²

4 3 3 *Capture*

The existing case law begs some important questions. In general, however, they reduce to a single query: why should we allow any association – including an independent school – to exclude anyone who wishes to join? One answer is “capture”. The argument from capture, broadly speaking, runs as follows. Capture is a function of – one might even say a necessary and logical consequence of – the very structure of associational or community life. In short, capture justifies the ability of associations and communities to control their association or community through selective membership policies, the manner in which they order their internal affairs and the discharge of members or users. Without the capacity to police their membership and expulsion policies, as well as their internal affairs, associations would face two related threats. First, an association would be at risk of having its aims substantially altered. To the extent the original or the current *raison d'être* of the association

⁴² South African Courts have engaged associational rights and fair hearings in four relatively recent cases. See *Taylor v Kurtstag* 2004 4 All SA 317 (W); *Cronje v United Cricket Board of South Africa* 2001 4 SA 1361 (T); *Ward v Cape Peninsula Ice Skating Club* 1998 2 SA 487 (C); *Wittmann v Deutscher Schulverein, Pretoria* 1998 4 SA 423 (T), 1999 1 BCLR 92 (T). The Courts have upheld the rights of associations to control the grounds for expulsion so long as they met basic standards of procedural fairness. In the *Cronje* case, the High Court deferred to the United Cricket Board when it came to deciding how and whether to deal with Hansie Cronje once he had been expelled from the association. In *Kurtstag*, the Court deferred to the Beth Din with respect to the excommunication of a member of the Jewish community who had voluntarily submitted himself to the jurisdiction of the Beth Din and had subsequently violated the edicts of the Beth Din. The High Court found that the Beth Din's procedures met the requirements of a fair hearing for a member of the community who had agreed expressly to follow the Beth Din's recommendations and that the grounds for the expulsion were consistent with the parties' agreement to enter into arbitration with regard to a maintenance order. In the *Ward* and *Wittmann* cases, the High Court reversed the expulsion. But they did not do so on the ground that the expulsion occurred for some politically or morally reprehensible reason. Indeed, to the extent that the Court in the *Wittmann* case weighs in on the power of an association to terminate membership when the member acts in a manner contrary to the decisions of the association's board and engages in expressive conduct that leads to criticism of the association, the Court decides that the association does possess such power. All four cases can be read as standing for the proposition that a member has vested interests in the association that, at a minimum, require a fair termination hearing. A non-member, on the other hand, possesses no such rights. Read this way, the *Kurtstag*, *Wittmann*, *Ward* and *Cronje* cases are of a piece. What ties them together at a theoretical level is the notion that once a person has been granted entry into an association, he or she accepts the basic principles upon which the association operates and thus the principles that may lead to his or her exclusion. The potential for exclusion is part of the consideration the member offers in return for admittance. As the Court in the *Kurtstag* case notes, “the potential for exclusion is part of the consideration the member offers in return for admittance.” (par 37).

matters to the extant members of the association, the association must possess ability to regulate the entrance, voice and exit of members. Without built-in limitations on the process of determining the ends of the association, new members, existing members and even outside parties could easily distort the purpose, character and function of the association. Secondly, and for similar reasons, an association's very existence could be at risk. Individuals, other groups, or a State inimical to the values of a given association could use ease of entrance into an association to put that same association out of business.

In a world without high transaction costs for the creation of associations, the risk of such penetration and alteration might be a tolerable state of affairs. But in the real world, the costs of creating and of maintaining associations are quite high. Just starting an association – be it religious, cultural, economic, political or intimate – takes enormous effort. To fail to take such efforts seriously, by failing to give individuals “ownership” over the fruits of their continued labour, is to risk creating significant disincentives to form, build and maintain their relationships. To fail to permit an independent school, a marriage, a corporation, a church, a golf club or a law society to govern its boundaries and its members in appropriate ways, would make these arrangements impossible to maintain. It would, in some respects, be equivalent to saying that anyone and everyone owns these associations – which is, of course, tantamount to saying that no one owns them. It is the purpose of freedom of association, freedom of religion and other community rights to ensure that both literal forms and figurative forms of property are protected from *capture* by those who would use them for ends at a variance with the existing and rightful members of the association.⁴³

4 3 4 *Constitutive attachments*

Associational freedom is often justified on the ground that it enables individuals to exercise relatively unfettered control over the various relationships and practices deemed critical to their self-understanding. But individual autonomy as the basis for associational freedom overemphasises dramatically the actual space for self-defining choices.

⁴³ How much control do we cede to the existing members of an association to determine who is entitled to membership? It depends. We tend to cede a great deal of control over entrance to marriages and over membership in religious institutions. However, when we move on to more public institutions such as trade unions or universities or law societies, then we may want such institutions to bear some sort of burden for demonstrating that the grounds for exclusion are reasonably or even inextricably linked with the purposes of the institution. The basis for the distinction between the two groups of associations should be obvious. It is not clear what, if anything, a State would gain through interference in entrance criteria for marriages and religions. It is, however, clear that issues of power, participation and opportunity in a liberal democratic society may require that institutions designed to deliver such goods – trade unions, political parties, universities – must do so in a fair manner – a manner that is in some sense congruent with the values of a liberal democratic society. See Rosenblum *Compelled Association, Public Standing, Self-respect and the Dynamic of Exclusion* in Gutmann (ed) *Freedom of Association* (1998) 75.

As I have maintained elsewhere, each self is best understood as a centre of narrative gravity that unifies a set of dispositional states that are determined by the practices of the various communities – religious, cultural, linguistic, national, familial, ethnic, economic, sexual, racial, social (and so on) – into which that self is born.⁴⁴ This determined, conditioned theory of the self supports some pretty straightforward conclusions about associational freedom and community rights in the context of independent schools.⁴⁵

Freedom of association, freedom of religion and community rights, correctly understood, force us to attend to the *arationality* of our most basic attachments and to think twice before we accord *our* arational attachments preferred status to the arational attachments of *others*.⁴⁶ These observations regarding constitutive attachments buttress my contention that independent educational institutions that pursue a particular way of being in the world ought to be able to exclude from the institution those learners who do not derive meaning from that way of being in the world, and whose presence, in significant numbers, would make the institution, *qua* religious, linguistic or cultural school, impossible to sustain.

4 3 5 *Associational rights, self-governance and pluralism*

If we accept that the practice of religion, the use of a language and the participation in cultural life are legitimate, constitutionally-sanctioned objectives, then discrimination narrowly tailored to meet those objectives must be able to pass constitutional muster. The alternative proposition –

⁴⁴ See Woolman *Freedom of Association* in Woolman et al (eds) *Constitutional Law of South Africa 2 ed OS* (December 2003) § 44.1(b); Woolman *The Selfless Constitution: Experimentation and Flourishing as the Foundations of South Africa's Basic Law* (forthcoming, 2007).

⁴⁵ At the same time this account of the self demonstrates the extent to which associations and communities are constitutive of the self. It dispels the notion that individuals are best understood as “rational choosers” of the ends they seek. The self should be seen as the inheritor and the executor of a rather heterogenous set of practices – of ways of responding to or acting in the world. The centrality of inherited practices or social endowments for both the creation and the maintenance of identity introduces an ineradicable element of *arationality* into the domain of individual decision-making. That is, despite the dominance of the enlightenment vision of the self as a rational agent, the truth of the matter is that the majority of our responses to the world are *arational*.

⁴⁶ The constitutive nature of our attachments also forces us to attend to another often overlooked feature of associations. We often speak of the associations that make up our lives as if we were largely free to choose them or make them up as we go along. I have suggested why such a notion of choice is not true of us as individual selves. It is also largely not true of associational life generally. As Walzer *On Involuntary Association* in Gutmann (ed) *Freedom of Association* (1998) 64 67 has convincingly argued, there is a “radical givenness to our associational life”. What he means, in short, is that most of the associations that make up our associational life are *involuntary* associations. We don’t choose our family. We generally don’t choose our race or religion or ethnicity or nationality or class or citizenship. They choose us. Moreover, to the extent that these involuntary associations provide our life with meaning, we must draw the conclusion that over a very large domain of our lives “meaning makes us” – we, as individuals, do not make that meaning. A reasonably equal and democratic society must mediate the givenness of our associational life and the aspirations of many of us to choose between those associational forms which still fit and those which do not. It is often the case that not choosing to leave an association, but choosing to stay, is what we truly cherish as freedom. As Walzer *On Involuntary Association* 73 suggests, we ought to call such decisions to reaffirm our commitments “freedom simply, without qualification”.

that no educational institution may discriminate on the basis of religion, language and culture – makes the possibility of sustaining, in South Africa, a diverse array of religious, linguistic and cultural communities an empirical impossibility.

4 4 Common law norms and the proper construction of PEPUDA in the context of the admissions policies of independent schools

The extant common law on association reinforces more general jurisprudential considerations in support of the proposition that independent schools intended to support a religion, a culture or a language, possess a significant degree of latitude with respect to admissions policies that differentiate between adherents and non-adherents. One old and venerable strand of the common law on association tolerates little internal or external interference with the critical purposes – or voice – of an association.⁴⁷ Another equally important line of cases is designed to prevent insiders and outsiders from altering the fundamental purposes of an association.⁴⁸ Although both lines of case law might have to yield to constitutional and statutory dictates, the courts ought to consider the learning in these cases as they attempt to strike the appropriate balance between equality, on the one hand, and community rights, on the other.

⁴⁷ See *Mitchell's Plain Town Centre Merchants Association v Mcleod* 1996 4 SA 159 166 (A) citing *Total South Africa (Pty) Ltd v Bekker* 1992 1 SA 617 624 (A) (emphasis added).

⁴⁸ A well-established body of common law precedent supports the contention that any proposed alteration of the fundamental objectives of an association requires the unanimous support of the association's members. This body of case law also underwrites the general proposition that Courts ought to be loath to disturb associational relations on the basis of general assertions of equity or fairness. See, generally, Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed (1982); *Murray v SA Tattersall's Subscription Rooms* 1910 TH 35 41 (Curlewis J: "If I be right in the view which I have taken of the object and purpose of the association, then the applicant cannot be compelled by a majority of the members – *no matter how great* – to become a member of an association or a club having a different object; he joined a betting club and cannot now be forced by a majority to become a member of a social club.") At the same time as this line of cases applies to the internal affairs of associations, it also offers insight into the extent to which parties outside an association ought to be allowed to transform that association. A more recent, and perhaps even more apposite, judgment is *Nederduitse Gereformeerde Kerk in Afrika (OVS) v Verenigende Gereformeerde Kerk in Suider-Afrika* 1999 2 SA 156 (SCA). The Dutch Reformed Church in Africa (NGKA) attempted to merge with the Dutch Reformed Mission Church in South Africa (NGSK). However, several individual churches and regional synods of the NGKA refused to accept the general synod's decisions. They asserted that the manner in which the NGKA general synod altered the constitution was *ultra vires*. They sought to have the amendments to the NGKA constitution and the consequent merger with the NGSK declared invalid. The Supreme Court of Appeal agreed. It held that the decision of the general synod of the NGKA to merge with the NGSK and the intermediate steps leading up to the merger conflicted with the clear and unambiguous wording of the constitution and vitiated, without the requisite authority (unanimity of the regional synods), the fundamental objectives of the association; all of the alterations to the NGKA constitution without the requisite authority were therefore *ultra vires* and invalid (168-175). The Supreme Court of Appeal's decision provides exceptionally strong support for the proposition that independent schools designed to promote a particular religion, language or culture cannot be changed from an association acting to further those interests into an association that simply furthers the educational interests of any South African learner.

4 5 Conclusions about constitutional and common law constraints on the PEPUDA test for admissions policies of independent schools

This brief foray into constitutional law and common law services the following set of conclusions. While the ends pursued by PEPUDA are largely egalitarian, a panoply of rights in the Constitution vouchsafes objectives that cannot be reduced to equality without doing substantial violence to the meaning of those objectives or to the heterogeneous society in which we live. Indeed, to put the matter more bluntly, the Constitution does not commit us to a society solely based upon equality. It commits us to “an open and democratic society based upon human dignity, equality and freedom”. The Constitution recognises that great stores of social capital (that can be used for transformative ends) will be lost unless we leave many “conservative” institutions just as they are.

5 Conclusion

The foregoing account allows us to reach at least one simple conclusion: the fact that PEPUDA applies to admissions policies at independent schools does not undermine the ability of independent schools to advance linguistic, cultural and religious understandings of the good life. The reason PEPUDA does not, necessarily, undermine the ability of independent schools to advance linguistic, cultural and religious understandings of the good life is that although discrimination in the admissions process may occur, any discrimination that advances the *legitimate* linguistic, cultural or religious objectives of the independent school and does so in terms of means narrowly tailored to meet those objectives, ought to survive PEPUDA analysis.

Furthermore, the Constitution’s undeniable commitment to transformation does not mean that every egalitarian claim will trump a more particularistic claim. The Constitution’s answer to those parents who wish to school their children in the language, culture or religion of their choice is unequivocal. Parents and learners may create and maintain privately funded independent schools that advance linguistic, cultural and religious understandings of the good life provided that they do not employ admissions policies or expulsion procedures that serve as proxies for discrimination based upon race.

OPSOMMING

Hierdie artikel beantwoord die vraag tot watter mate dit vir onafhanklike skole aanvaarbaar is om teen leerders te diskrimineer ten einde die legitieme grondwetlike oogmerke van verskeie godsdienstige, kulturele en taalgemeenskappe te bevorder. ’n Noukeurige analise van die Grondwet bring aan die lig dat enkelmedium-openbare skole, geloofsgebaseerde skole of kultureel-homogene openbare skole nie grondwetlik gewaarborg word nie, maar dat artikel 29(3) wel aan leerders en hul ouers die reg verleen om uit hul eie sak onafhanklike skole te bou wat hul voorkeurmedium van onderrig aanbied, wat ’n spesifieke kulturele etos versterk, of wat ’n omvattende godsdienstige opvatting van “die goeie lewe” bevorder. Die antwoord op die vraag oor die mate waartoe hierdie artikel 29(3)-skole mag diskrimineer, is te vind in ’n noukeurige analise van die Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

Behoorlik uitgelê, voorsien PEPUDA dat onafhanklike skole 'n taalkundige, kulturele en godsdienstige voorstelling van die goeie lewe bevorder op 'n wyse wat op die oog af diskriminerend lyk. Die toelatingsbeleide of uitsettingsprosedures wat deur onafhanklike skole gebruik word, mag tussen leerders diskrimineer so lank as wat die diskriminasie (a) die *legitieme* taalkundige, kulturele of godsdienstige doelwitte van die skool bevorder; (b) dit doen deur middele te gebruik wat noukeurig ontwerp is om hierdie doelwitte te bevorder; en (c) nie die waardigheid van die leerder aantast nie.